No. 80-242

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. LEHMAN,
SECRETARY OF THE NAVY,

Petitioner,

v.

ALICE NAKSHIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the parties in an action against the federal government under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), are entitled to trial by jury.

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INTRODUCTION

Citations to the opinions and judgments delivered in the courts below and a statement of jurisdiction of this court are found at page 1 of the petitioner's brief (hereinafter "P. Brief").

STATEMENT

Petitioner failed to set out the reasoning of the Court of Appeals in rejecting the government's position that the doctrine of sovereign immunity embraces immunity from jury trial.

The Court recognized that the government cannot be sued without its consent; can specify the procedures, including whether the case is to be tried to a jury or to the court; but that in the instance of a statute which does not explicitly state what kind of trial procedure shall be used, there is no automatic presumption against jury trials,

Petitioner's Appendix ("Pet. App."), 10a.

The Court went on to state that courts have inferred congressional intention allowing jury trials in actions against the government without explicit statutory grants, relying on United States v. Pfitsch, 256 U.S. 547 (1921), and Law v. United States, 266 U.S. 494 (1925).

The Court also stated that the government's argument that there is a presumption against jury trials in actions against the government appears to be connected with the misunderstanding of the doctrine of sovereign immunity. The Court stated that since sovereign immunity bars all actions against the government, ". . . it is difficult to see why this doctrine should create a presumption against any particular method of trial.

Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials." Pet. App., 9a.

SUMMARY OF ARGUMENT

I

There is no constitutionally-based right to jury trial in suits against the federal government because suits against the sovereign were unknown at the common law. Further, the government can declare in what court it may be sued and prescribe the forms of pleading and rules of practice, including trial practice.

On the other hand, there is no general presumption against jury trials in suits in which the government is sued and the statute is silent concerning trial procedure. Immunity having been waived,

the sovereign immunity doctrine "drops out of the picture," to use the words of the Court of Appeals below, and the determination of whether jury trial is permissible is determined by well-established principles of statutory construction.

The decision of the Court of Appeals below is well within the case law tradition of unbroken precedent in which the courts, including this Court, have been asked to determine whether a right to jury trial arises by implication from the statute allowing suit against the government. The decisions have, without exception, affirmed a right to jury trial.

Congress has expressly denied jury trial in suits against the government in at least three instances, one denial of which only lasted a year; expressly allowed them in at least two instances;

and remained silent on the matter in many others.

Of note are cases in which the government is the plaintiff, inasmuch as the analysis in arriving at an inference of jury trial when the statute is silent about trial procedure is the same as in the instances when the government is the defendant. In these instances, the courts found a right to jury trial.

The "deep pocket" theory the Petitioner poses does not apply to federal ADEA cases, since juries are restricted to awards of "amounts owing" (generally, backpay) and liquidated damages (only in cases of willful violation of the ADEA) equal to the amount of "pecuniary loss." The trend of the case law is not to permit compensatory or punitive damages.

In summary, courts have unhesitatingly found a right to jury trial as much

in cases in which the government is sued as they have in cases involving nongovernmental parties, because of the recognition that the jury trial is the basis of the American legal system.

The manner in which the Court of Appeals below arrived at its decision affirming Ms. Nakshian's right to jury trial is not without precedent.

An examination of the case law in this area proves that the two criteria found in the language of Section 15 of the Act on which the Court of Appeals relied to conclude a right to jury trial in federal ADEA cases are the two classical determinants traditionally used by courts when ascertaining whether jury trial can be implied from statutory language.

Those two determinants are exclusive jurisdiction in district courts and a

characterization of the action or remedy as legal. The Court of Appeals' decision, based on these two factors, is part of an unbroken chain of precedent, the most interesting of which is Collins v. Govt. of Virgin Islands, 366 F.2d 279 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967). In that case, the government sought a jury trial in a tort action in which it was sued; was denied it; and appealed from the denial. The Third Circuit found in the government's favor for the same reasons the Court of Appeals below found in Ms. Nakshian's favor, namely, exclusive jurisdiction in the district court and the characterization of the action as one at law.

This Court found determinative of the right to jury trial in ADEA cases the language in 29 U.S.C. §626(c)(1) characterizing relief available in courts as

both legal or equitable, Lorillard v. Pons, 434 U.S. 575 (1978). This reasoning is clearly appropriate when, as here, the relief available under another section of the ADEA is also described as "legal."

Petitioner argues that the enforcement scheme in Section 15 of the ADEA is modeled after Title VII, therefore implying a denial of jury trial. However, the remedies and procedures of Section 15 which this Court said in Lorillard must be looked to when determining whether jury trial is implied, depart dramatically from the Title VII scheme. First, there is no requirement of exhaustion of administrative remedy under Section 15 as there is in Title VII, and second, one is entitled to both legal and equitable relief under Section 15, whereas, only equitable relief is possible under Title VII.

Applying the provisions of Section 626(c)(2), the jury trial amendment, to Section 15 of the ADEA is not repugnant to the purposes of the act or of its amendments in 1974 and 1978. In none of the articulated purposes, in particular, those of the 1978 amendments, is there anything to suggest a restriction on the liability of the federal government. In particular, federal employees were afforded greater benefits under the 1978 amendments than what was afforded to non-federal employees, since the upper age ceiling was abandoned completedly for individuals covered by Section 15 of the act, but only expanded by five years, to age 70 for nonfederal employees. Construing the ADEA in pari materia with the FLSA as well as construing the sections in pari materia with other sections of the ADEA warrants a right to jury trial in suits under Section 15 of the ADEA.

While the petitioner argues that Section 15(f) of the ADEA, added to Section 15 in 1978, prohibits the application to Section 15 of any provision of the ADEA, other than the provisions of Section 15, he can point to no legislative history that supports such a theory.

Rather, from the limited legislative history on the subject, the purpose of the amendment is to protect the individuals protected under the provisions of Section 15 from the employer defenses in Section 4(f)(2), from the exceptions to ADEA coverage in Section 11(f), and from the restrictions or qualifications in Sections 12(a), (c) and (d).

Section 15(f) became effective the same time as the amendments to Sections 15(a) and 12(a), six months beyond the date of the enactment of the amendments; whereas, the jury trial amendment, Section

7(c)(2), became effective on the date of enactment of the amendments.

It is noted that the petitioner never raised this argument in the courts below, thus affording no opportunity for the courts to rule on the argument before this Court passes on its merits. Even if Section 15(f) prohibits the application of the jury trial provision to Section 15 ADEA suits, legal relief is still available in such suits by the provisions of Section 15.

The legislative history of the act and of the amendments betray no sentiment on the part of Congress to limit or restrict the rights, remedies and procedures available to persons aggrieved by nonfederal employers when applied to the federal sector.

Finally, it cannot be gainsaid that federal ADEA litigation comprises a small percentage of government litigation in

which jury demands are made, making up only 9.5% of such litigation. This percentage amounts to only eighteen demands in a 25-month period in the District of Columbia where the greatest amount of government litigation occurs. The jury demands resulting from federal ADEA litigation are only two percent higher than the number of jury demands made by the government itself.

ARGUMENT

TRIAL BY JURY IS AVAILABLE TO PARTIES IN SUITS BROUGHT AGAINST THE FEDERAL GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

I. There Is No Presumption Against Jury Trials In Suits Brought Against the Federal Government.

A constitutionally-based right to jury trials in suits at common law[1] does not extend to civil suits against the federal government because suits against

1. The term "common law" is used throughout this brief in two ways, based on the context in which the phrase is found. Common law refers to the body of judge-made law in England that was passed on by the framers of the Constitution and filtered through and transformed in to the American experience of jurisprudence. In this sense, the term "common law" refers to that system of law of England in which distinctions sometimes sharply drawn and sometimes meaningless are made among the legal writs sought in the common law courts, equitable remedies sought in the courts of the Chancellor and cases arising in admiralty and under maritime jurisdiction. However, "common law" is also used in a more narrow sense, to distinguish the legal writ or remedy sought in the common law courts of the king as opposed to an equitable remedy sought in the courts of equity, i.e., the courts of the Bishop or Chancellor. See J. Storey's definitions of the term in Parsons v. Bedford, 3 Pet. 433, 446-447.

the sovereign were unknown to the common law.[2]

Certainly, also, the government ". . . can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States." McElrath v. United States, 102 U.S. 426, 440 (1880).

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2. But see, Chisholm v. Georgia, 2 Wall 419, 459-60 (1792), in which Justice Wilson stated:

> ". . . the king's court should be open to all plaintiffs by which, without delay, they should have remedial writs, as well as against the king or against the queen, as against any other of the people. (d). . . . True, it is that now, in England, the king must be sued in his courts by petition; but even now the difference is only in the form, not in the thing. The judgments or decrees of those courts, will substantially be the same upon a precatory as a mandatory process." (Emphasis added).

However, the analysis does not stop there in cases in which suit is brought against the government involving statutes which are silent concerning the mode of trial procedure. As the Third Circuit reasoned in Collins v. Govt. of Virgin Islands, 366 F.2d 279, 282 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967):

> "The question as to whether Government having waived this immunity is entitled to a jury trial is free of the impact of the Seventh Amendment to the Constitution since it is clear that a suit against the sovereign was not a suit at common law within the meaning of the Seventh Amendment. Rather, the answer must be sought in well-established principles relating to the waiver of immunity by the sovereign."

In Galloway v. United States, 319 U.S. 372 (1943), and in Wickwire v. Reinecke, 275 U.S. 101, 105 (1927), this Court noted that the Seventh Amendment did not apply to the cases because of the common law proscription on suits

against the sovereign but, nonetheless, recognized the right to jury trial in both instances.

In Galloway, this Court stated:

> "The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable." 319 U.S. at 388.

Galloway was a suit involving the War Risk Insurance Acts of 1917, §400, 40 Stat. 409; 1918, §13, 40 Stat. 555.

Prior to Galloway, this Court had already determined that the War Risk Insurance Act was construed to mean that the "usual procedure . . . in actions at law for money compensation" applied, and therefore, right to jury trial was implied from the statute. Law v. U.S., supra.

Later, Congress amended the Act, changing the procedure to that used under the Tucker Act, which expressly disallows jury trials. See 43 Stat. 607, 613; 24 Stat. 505. A year later in 1925, Congress had a change of heart and statutorily reinstated the right to a jury trial. 43 Stat. 1302; H.R. No. 1518, 68th Cong., 2d Sess. 2, as cited in Galloway v. U.S., 319 U.S. at 318, ftn. 18. See also, Prouty v. United States, 94 F. Supp. 320, 321 (D.N.H. 1950).

In Wickwire, this Court noted the government had abandoned in its brief on the merits an argument raised in its opposition to the petition for writ of certiorari, that the petitioner's assignment of error was inadequate because it was not based on the Seventh Amendment. This Court assumed the objection was not renewed, ". . . doubtless because the right of the petitioner for a jury in

such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of §3226, Revised Statutes, which has reference to a suit at law." 275 U.S., at 105-106.

See Wilson v. United States, 530 F. 2d 772, 780, ftn. 4 (8th Cir. 1976) (concurring opin., J. Lay): "The right to a jury trial on factual questions in refund suits was originally recognized by implication from a statutory reference to suits at law. [Wickwire v. Reinecke, 275 U.S. 101, 105-06 . . . (1927)]. Today, the statutory grant is explicit in tax refund cases under 28 U.S.C. §2402, enacted in 1954 as an amendment to the Tucker Act, 28 U.S.C. §1346, Act of July, 30, 1954, Ch. 648, §2(a), 68 Stat. 589." See also, Smails v. O'Malley, 127 F.2d 410 (8th Cir. 1942), and United States v. Lease, 346 F.2d 696 (2nd Cir. 1965),

both holding right to jury trial in district court in tax refund suit.

Petitioner noted when Congress amended the Tucker Act in 1954, to allow jury trials in tax refund cases, one of the House reports stated that the "legislation did establish a 'wholly new precedent' because 'for the first time jury trials would be permitted in suits against the Government.' H.R. No. 659, 83d Cong., 1st Sess. 3 (1953)." P. Brief, 12-13.

Obviously, the statement is factually impossible on its face, since the Amendment itself was merely a codification of the right to jury trial already established as a matter of case law, including by this Court.

Further, as we have already demonstrated and shall now demonstrate, by 1954 the government had also been sued under other statutes which this Court

had determined by implication made available jury trial to the parties if so desired.

The War Risk Insurance Act cases are one kind, while the tax refund suits in district court are another. However, in a seminal case, U.S. v. Pfitsch, supra, this Court had determined by implication from the statute that parties were entitled to jury trial in suits brought against the federal government under Section 10 of the Lever Act, Aug. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §3115-1/8ii).[3]

3. In a subsequent case brought under §10 of the Lever Act, the government argued the following: "It would seem to be clear that, from the language of §10 of the Lever Act, the only issue which Congress contemplated would arise under the Act was that of just compensation, and it was willing, indeed, it insisted, that the property owner have the right of trial by jury as to that issue. United States v. Pfitsch, 256 U.S. 547." Houston Coal Co. v. United States, 26 U.S. 361, 363 (1922). A rather ironic statement in view of the petitioner's arguments in the instant case that silence, at least in one section of a statute, namely, Section 15 of the ADEA, regarding

(Continued)

In Prouty v. U.S., supra, the court concluded that jury trial was available in addition to the War Risk Insurance Act of 1917 and the World War Veterans Act of 1924, under the National Service Life Insurance Act of 1940. Thus, in 1954, jury trial was available in suits against the government under at least four statutes.

Before proceeding further, it is necessary to delineate what Congress generally has done concerning mode of trial procedure in suits involving statutes in which the government is a defendant.

(Footnote 3 continued)

trial procedure is construed as denial of jury trial; whereas, such silence in a section of another statute, Section 10 of the Lever Act, is construed as an insistence on a right to jury trial.

A. Express Denial of Jury Trials

In at least three instances, Congress has explicitly denied trial by jury in suits brought under the Tucker Act, except tax refund suits, 28 U.S.C. §1346; 28 U.S.C. §2402; and in any suit brought against the government to quiet title to real estate, 28 U.S.C. §2409a; 28 U.S.C. §2409a(e); and for one year in suits brought under the World War Veterans' Act of 1924. See pp. 13, 14 and 22 of this brief.

The first general denial of jury trial applies to suits brought under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680; 28 U.S.C. §1346(b). Obviously, Congress had good reason for placing an express denial of jury trial in the statute if Congress wanted only court trials in such actions, since "[i]n such an action it is hornbook law that the parties are entitled to a trial

by jury." Collins v. Govt. of Virgin Islands, 366 F.2d 279, 283 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967).

The same rationale applies to actions to quiet title to real estate brought under 28 U.S.C. §2409a, inasmuch as although actions to quiet title to real estate might be considered actions in equity, Congress nonetheless had vested exclusive jurisdiction over such suits in district court, 28 U.S.C. §1346(f). Thus, by the action Congress took in March 1924 and then in 1925, amending the World War Veterans' Act, it established it was aware of the significance which placing exclusive jurisdiction in the district court over actions took on with respect to the matter of trial procedure -- and wanted to avoid the obvious result of trial by jury by expressly denying it.

As the ensuing analysis demonstrates, such a belief on the part of Congress is correct, for in every instance save one, in which statutes allowing suits against the government are silent concerning the mode of trial procedure, courts have construed by implication from the statute a right to jury trial.

B. No Provision for Trial Procedure

1. The War Risk Insurance Acts of 1917 and 1918, the World War Veterans' Act of 1924, and the National Service Life Insurance Act of 1940.

As already indicated in this section, this Court implied a right to jury trial under the War Risk Insurance Act of 1917, §400, 40 Stat. 398, in Law v. U.S., 266 U.S. at 496. See also, United States v. McGovern, 299 F.2d 302 (9th Cir. 1924); United States v. Thomas, 53 F.2d 192, 195 (4th Cir. 1931).

In Galloway, supra, the suit was also brought under the War Risk Insurance Acts of 1917 and 1918, and a jury heard the case, although the government was granted its motion for a directed verdict. See pp. 12-14 of this brief.

In 1924, the World War Veterans' Act superseded the War Risk Insurance Acts and Congress expressly provided in the act that the procedure for suits brought under the statute would be the procedure for suits brought under the Tucker Act. Within a year, Congress, at least as interpreted by subsequent courts ruling on the issue, had a change of heart and amended the portion of the act concerning jurisdiction and procedure, so that, in effect, Sections 5, 6 and 10 of the Tucker Act applied to suits brought under the statute, but not Section 2 of the Tucker Act, which precluded jury trials.

"The conclusion is irresistible, however, that by omitting Section 2 of said Act, Congress intended to give litigants the right of trial by jury as in ordinary cases." Hacker v. United States, 16 F.2d 702, 704 (5th Cir. 1927), H.R. No. 1518, 68th Cong., 2d Sess. 2, states that the amendment to the act was done with the intention to "'give the claimant the right to a jury trial.'" Galloway v. U.S., 319 U.S. at 389, ftn. 18.

Suitors in cases brought under the World War Veterans' Act of 1924 therefore are entitled to jury trials if so desired. Whitney v. United States, 8 F.2d 476 (9th Cir. 1925); Hacker v. U.S., supra; Holliday v. United States, 87 F. Supp. 367, 368, 114 Ct. Cl. 702, in which the Court of Claims held it did not have jurisdiction to hear suits under the World War Veterans' Act of 1924.

In Prouty v. U.S., supra, the court held a right to jury trial under the War Risk Insurance Acts of 1917 and 1918, under the World War Veterans' Act of 1924, and under the National Service Life Insurance Act as well, since the amended procedure applicable to the Veterans Act the court found ". . . obtained to the enactment of the National Service Life Insurance Act of 1940, 38 U.S.C. §§801, 817, 54 Stat. 1008-1014, wherein it was adopted and continued."

2. Section 10 of the Lever Act

As we have already indicated, this Court found an implied right to jury trial in suits arising under Section 10 of the Lever Act, although this section, like the acts described in subsection 1 above, is silent with respect to the mode of trial procedure.

3. Tax Refund Suits, Section 3226, Revised Statutes.

As we have already indicated, this Court also found an implied right to jury trial in suits brought under §3226, Revised Statutes, although once more the statute is silent respecting mode of trial procedure.

4. Contract Settlement Act of 1944

In Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 240 F.2d 444, 446 (9th Cir. 1957), the Ninth Circuit found an implied right to jury trial when the Reconstruction Finance Corporation, a wholly-owned government corporation, is sued under the Contract Settlement Act of 1944, 41 U.S.C. §§101, et seq.; July 1, 1944, C. 358, §1, 58 Stat. 649, although the statute says nothing about the mode of trial procedure. See also, R.F.C. v. Lyon, 179 Wash. 673, 38

P.2d 1029 (1934). The Ninth Circuit relied on U.S. v. Pfitsch, supra, in so ruling.

5. Tort Action Against Virgin Island Government.

A case of surprising twist and of relevance to this case is Collins v. Govt. of Virgin Islands, supra. The case involved an act of the Virgin Islands, Act 921, §2, waiving immunity of the government and making it subject to suit in tort actions "'as in the case of any other defendant, subject to the same procedures and defenses . . .'" (emphasis is supplied by opinion writer). 366 F.2d at 283.

This case is significant for three reasons:

(1) The government wanted the jury trial, not the plaintiff, was denied it, and appealed from the denial.

(2) Act 921 is identical in its waiver language to that of the Federal Tort Claims Act (28 U.S.C. §1346(b)), but unlike the Federal Tort Claims Act, is silent with respect to the mode of trial procedure, thus buttressing our thesis discussed at p. 19 of this brief, that if Congress had not expressly disallowed a jury trial in Federal Tort Claims Act cases, a right to jury trial would have been implied, as it was in the Collins case.

(3) The reasoning the Third Circuit followed in reaching its conclusion that the government is entitled to a jury trial in the tort action is identical to that followed by the District of Columbia Circuit in reaching its conclusion that Ms. Nakshian is entitled to a jury trial. It found that the Seventh Amendment did not apply; that the government can dictate the terms and conditions under which

it may be sued; that the grant of jurisdiction is an aid in determining the method trial in the absence of an expressed provision; and that in addition to "hornbook law" entitlement to jury trial in tort actions, the action is one at law. Id., at 283.

6. Actions Brought Under the Constitution Against Federal Officials in Individual Capacity.

This Court has stated in dictum that individuals bringing suits against federal officials for damages in a Bivens action are entitled to jury trials. Carlson v. Green, ___ U.S. ___, 100 S. Ct. 1468 (1980).

7. Tax Suits Brought in Tax Courts Without Payment of the Taxes.

In this instance, in which the courts were asked to construe a statute silent with respect to trial procedure, is the right to jury trial denied. Bagur v.

C.I.R., 603 F.2d 491, 500 (5th Cir. 1979); Dorl v. C.I.R., 507 F.2d 406 (2nd Cir. 1974). However, as will be analyzed more fully, infra, this conclusion of no right to jury trial in tax court is consistent with the line of cases discussed in this section, inasmuch as a critical index necessary to establish jury trial by statutory implication is lacking, namely, exclusive jurisdiction in the district courts, found, however, in tax refund suits.

8. Land Claims in Guam

Franquez v. United States, 604 F.2d 1239 (9th Cir. 1979), a case cited by our amicus, American Federation of Government Employees ("AFGE"), is one arising under 42 U.S.C. §1424c and dealing with the review of claims concerning land acquired by the United States government on Guam.

The statute is silent concerning trial procedure, and jury trial was demanded. The government argued that an

express grant of jury trial was required. The court rejected the argument and found right to jury trial by implication.

Thus, the Court of Appeals' decision affirming a right to jury trial in the absence of an express grant in the statute allowing suit against the government is in conformity with a well-developed body of case law in this area stemming from this Court's guidance in Pfitsch, Law, Galloway and Wickwire.

C. Express Grant of Jury Trial

As already set out in this brief at pp. 21-25, Congress has expressly allowed jury trials in tax refund cases and, perhaps, in World War Veterans' Act cases, depending on what is considered to mean express grant of jury trial. Both statutory grants were an affirmance of the case law allowing jury trials.

D. Government As Plaintiff

Although cases in which the government is suing are distinguished from cases in which the government is sued, the analysis concerning the right to jury trial when the statute says nothing about trial procedure is the same as in the cases in which the government is the defendant.

In the cases which this author found involving the government as a plaintiff proceeding under statutes silent about trial procedure, the courts found a right to jury trial:

1. **Forfeiture of Automobile:** United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980);

2. **Government Seeking to Indemnify Subcontractors Working for Government Contractors:** Miller Act, 40 U.S.C. §270a(a);

United States v. Biggs, 46 F. Supp. 8, 11 (E.D. Ill. 1942);[4]

3. Government Seeking Treble Damages from Landlord Who Overcharges On Rents: Emergency Price Control Act of 1942, Chap. 26, §205(e), 56 Stat. 23; Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952);

4. Government Seeking Civil Penalties Under §§4 and 5 of the Alien Immigration Act: Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37, 47 (1914);

5. Condemnation Proceedings: United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952); Monolith, supra, at 447.[5]

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4. In Part IV of this brief, a summary is set out of research of cover sheets (Form JS-44c) filed with complaints in the District Court for the District of Columbia to determine the number of jury demands made in which the Government is a party. The research revealed that the Government routinely demands a jury trial under the Miller Act and under the condemnation statute, 40 U.S.C. §257.

5. Petitioner challenges the vitality of Pfitsch, arguing that this Court's reliance on Filbin Corp. v. United States, 266 F. 911 (E.D.

(Continued)

See Rules 71A(h) and (k), providing for jury trial in condemnation proceedings. Petitioner poses the specter of overly generous juries, in view of the government's "deep pocket."[6] However, the deep pocket theory has no applicability to the instant

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(Footnote 5 continued)

S.C. 1920), is no longer valid for the reason that this Court rejected the notion that the Seventh Amendment guarantee does not apply in condemnation proceedings, in United States v. Reynolds, 397 U.S. 14 (1970). However, such a view is purely academic, since ". . . while a jury trial is not required in condemnation suits as a constitutional matter, in practice juries have often been used in such actions. Monolith, supra, at 447.

Furthermore, in Monolith, the court cites United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952), in which the court discusses the evolution of Rule 71A, Federal Rules of Civil Procedure, applying to federal condemnation cases. The Theimer court found that "' [p]rolonged study had been given to the subject of condemnation cases by the Advisory Committee of the Supreme Court. . . . "We therefore conclude that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right. . . ."'" Ibid.

6. In spite of this, in Lorillard v. Pons, 434 U.S. 575 (1978), this Court unhesitatingly extended the right of jury trial to other public employment where the deep pocket theory has as much applicability as it does to public employment involving the federal government.

case for the same reason Congress determined that a jury in tax refund cases supposedly would not wreak havoc with the United States Treasury. Just as juries, sitting in tax refund cases, are limited to the amounts of overpaid taxes, so juries sitting in federal ADEA cases are restricted to "amounts owing," defined as "unpaid minimum wages and overtime compensation." See 29 U.S.C. §626(b).

The trend of the case law is not to permit compensatory and punitive damages.[7]

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7. Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977); Rogers v. Exxon Res. and Engr. Co., 550 F.2d 834 (3rd Cir. 1977); Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979). This trend is supported by the legislative history surrounding the 1978 ADEA Amendments:

> "The House recedes with an amendment which provides for a jury trial on any issue of fact in an action for recovery of a violation of the ADEA. Under Section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, 'amounts owing' contemplates two elements: First, it includes items of pecuniary or economic loss such as

(Continued)

Thus, the only damages that can be awarded are liquidated damages, but only if willful violation of the law is proven,[8] and the measure of the liquidated damages, according to Congress, is the "pecuniary loss." See ftn. 7.

In conclusion, courts have unhesitatingly found a right to jury trial in cases in which the government is sued and the statute is silent concerning trial procedure, as they have in cases involving nongovernment parties.

(Footnote 7 continued)

> wages, fringe, and other job related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. 124 Cong. Rec. H-2000 (daily ed., March 23, 1978).

8. Lorillard v. Pons, supra, 29 U.S.C. §626(b); H.R. 805, U.S. Code, Congressional & Admin. News, 90th Cong., 1st Sess., 1967, Vol. 2, p. 2218; Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979); Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980).

This is based on a fundamental tenet of American law, namely, that the jury trial is the foundation of our legal system:

> "'"Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486'. . . Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959)." Collins v. Govt. of Virgin Islands, supra, at 284.

Moreover, "since 'the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.' Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937)." Id. See also, Dairy Queen v. Wood, 369 U.S. 469 (1962); Lorillard v. Pons, supra; Pernell v. Southall Realty, 416 U.S. 363 (1974).

Finally, the immunity doctrine has fallen into disfavor with time:

"'But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment.' National City Bank of New York v. Republic of China, 1955, 348 U.S. 356, 359 . . ." Monolith, supra, at 447.

II. THE RIGHT TO JURY TRIAL ARISES BY IMPLICATION FROM THE LANGUAGE OF SECTION 15 OF THE ADEA AND EXPRESSLY FROM THE LANGUAGE OF SECTION 7(b) OF THE ACT.

A. By Implication from the Language In Section 15(c).

1. Exclusive Jurisdiction in the District Courts.

The Court of Appeals relied on the language of 15(c), placing exclusive jurisdiction of federal ADEA suits in the district courts, to infer a right to jury trial. Pet. App., 10a-11a. This reasoning is not without precedent and, in fact, exclusive jurisdiction in the district

courts is one of two critical determinants upon which the inference to jury trial arises by implication from the statute.[9]

The seminal case for this proposition is one decided by this Court, U.S. v. Pfitsch, 256 U.S. at 547:

> "The nature of the jurisdiction of the District Court is of importance, not only because of the question directly involved, but because the answer given to it will determine incidentally whether plaintiffs who proceed under Section 10 are entitled to trial by jury" [of the Lever Act].

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9. Petitioner is wrong in his contention that pertinent language in 28 U.S.C. §770 concerning what he describes as a statutory grant of general right to jury trial in district court was abolished by the Revision Act of 1948, ch. 646, Section 39, 62 Stat. 992. P. Brief, ftn. 27, pp. 32-34. The history of Sections 9 and 12 of the Judiciary Act of 1789 reveals the close relationship between the Seventh Amendment and the statute. Legislative action on the first 10 Amendments was completed by September 25, 1789. The Judiciary Act was enacted by Congress the day before. "Hence, the contemporaneous interpretation of the Amendment [Seventh] by its framers, as embodied in the terms of the Judiciary Act is of great weight." United States v. One 1976 Mercedes Benz 280S, supra, at ftn. 8, 456, and ftn. 29, 459.

(Continued)

See also, Law v. U.S., 266 U.S. at 496:

> "The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the court in actions at law for money compensation [citations omitted]." Accord, Galloway v. U.S., 319 U.S. at 389, ftn. 18. Cf. Halliday v. United States, 315 U.S. 94 (19__), and Berry v. United States, 312 U.S. 450 (19__).

See Prouty v. U.S., supra: (". . . [J]urisdiction was lodged exclusively with the district court . . ." and therefore the court held right to jury trial);

(Footnote 9 continued)

Section 9 of the Judiciary Act is therefore a restatement of the Seventh Amendment in the sense that all civil cases except those in admiralty and maritime jurisdiction (equity was omitted, but cases in equity were not traditionally tried to juries in England in 1789, U.S. v. One 1976 Mercedes Benz 280S, supra, at 458) are suits at common law. Therefore, the language of Section 9 is redundant of the language in Rule 38(a). The Historical and Revision Notes, 28 U.S.C. §1873, which replaced the repealed statute, 28 U.S.C. §770 (formerly 566 and 648 Rev. Stats., which were Sections 9 and 12 of the Judiciary Act), makes clear that the provision for right of jury trials in district courts was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure. 28 U.S.C.A. §1873, Historical and Revision Notes, page 317.

Whitney v. U.S., supra, at 478: ("We cannot find in the Act of March 4, 1925, any provision which takes this case out of the ordinary rule obtaining in the trial of actions at law in the district court"); Hacker v. U.S., supra, at 703: ("Congress undoubtedly considered that, the government having entered a field primarily left to private enterprise, litigants were entitled to the usual court procedure [of jury trial]"); Collins v. Govt. of Virgin Islands, supra, at 283: ("The grant of jurisdiction by the sovereign is an aid in determining the method of trial in the absence of an expressed provision [citations omitted]").

The observation of the Court of Appeals that Congress intended jury trials by vesting exclusive jurisdiction in the

district court is thus well grounded in precedent.[10]

2. The Provision for Legal Relief in Section 15(c).

a. The Lorillard Decision. In Lorillard, supra, this Court held that in addition to incorporating into the ADEA the provisions of the FLSA, its inference of right to jury trial in ADEA suits is further supported by the use of the term "legal relief" in the statute.

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10. We agree with Petitioner that Congress probably vested exclusive jurisdiction in the district courts also because the district courts already had jurisdiction of nonfederal ADEA cases, 29 U.S.C. §626(c), thus demonstrating an intent on the part of Congress to establish identical rights, remedies and procedures for individuals in both federal and nonfederal employment as well as an intent that all of the sections of the act in pari materia should be interpreted and construed together. P. Brief, 30-31.

This Court stated:

> "'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.' Standard Oil v. United States, 221 U.S. 1, 59 (1911). See Gilbert v. United States, 370 U.S. 650, 655 (1962); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). We can infer, therefore, that by providing specifically for 'legal' relief, Congress knew the significance of the term 'legal,' and intended that there would be jury trial on demand to 'enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.' §7(b), 29 U.S.C. §626(b)." [Footnote omitted].

See also, Sands, Sutherland Statutory Construction, Vol. 2A, §50.03, p. 278:

> "Furthermore, common law meanings are assumed to apply even in statutes dealing with new and different subject matter than that which comprised the legal context at common law to the extent that they appear fitting and in the absence of evidence to indicate contrary meaning."

b. Other Case Law Precedent. Prior to Lorillard, this Court reached the same conclusion in a case where the action involved a legal remedy:

> ". . . [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves right and remedies of the sort typically enforced in an action of law. Curtis v. Loether, 415 U.S. 189, 195 (1974).
>
> See also Pernell v. Southall Realty, 416 U.S. 363, 375, 383 (1974); Kohl v. United States, 91 U.S. 367, 375-76 (1875)." U.S. v. One 1976 Mercedes Benz 280S, supra, ftn. 21.

This Court found a right to jury trial by implication from §3226, Revised

Statutes, in tax refund suits in Wickwire v. Reinecke, supra, at 105. See also, Wilson v. United States, 530 F.2d 772 (8th Cir. 1976).

Similarly, the Ninth Circuit determined a right to jury trial in a suit under the Contract Settlement Act of 1944, by first characterizing the suit as one for monetary compensation and then by relying on Pfitsch, concluding that a right to jury trial is an "'incident'" to such suits. Monolith, supra, at 446.

As the Seventh Circuit stated:

> ". . . [I]f Congress creates a new statutory right (without providing a special statutory proceeding for enforcement) and relegates parties to their common law remedies (such as a civil action for collection of a sum certain, . . .) then the ordinary common law remedy carries with it its ordinary incident of jury trial." (Emphasis added). U.S. v. One 1976 Mercedes Benz 280S, supra, ftn. 21. at 458, ftn. 21.

See also, Collins v. Govt. of Virgin Islands, supra, at 283: ("Our conclusion [of right to jury trial] is further supported by the fact that this was an action at law" relying on Pfitsch, supra); and Leimer v. Woods, supra: (right to jury trial, since the matter of recovery of damages has been left to the general language of the statute within the traditional scope of the common law actions of debt).

The Court of Appeals' reliance on the appearance of the term "legal relief" in the text of Section 15(c) to find by implication a right to jury trial is, like its reliance on the fact of exclusive jurisdiction of the district courts over federal ADEA suits, an inference based on unbroken precedent.

3. Remedies and Procedures in Section 15 of the ADEA.

Petitioner, like the employer in Lorillard, argues that the enforcement scheme set out in Section 15 is modeled after Title VII, which does not allow jury trials, and therefore, the term "legal relief" should not be given its well-established common law meaning. P. Brief, 35-41.

This Court rejected such a reliance as being misplaced: ". . . [I]n deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences." (Ibid., at 9).

There are significant differences between the remedial and procedural provisions of Title VII, Section 717, 42 U.S.C. §2000e-16, and Section 15 of the ADEA, 29 U.S.C. §633a.

29 U.S.C. §633a(c) allows the federal employee to bypass completely the

administrative remedy set out in Section 633a(b) by filing a notice of intent to sue with the Equal Employment Opportunity Commission 30 days prior to filing suit, and after filing suit may be awarded legal and/or equitable relief. Such a bypass of the administrative remedy is not permitted, nor is it possible to obtain legal relief under Title VII. See 29 U.S.C. §1613, which sets out the administrative complaints procedure under Title VII. See also, §§717(b)(c)(d); and §706(g), Title VII, 1964 Civil Rights Act as amended, 42 U.S.C. §2000e, et seq.

This notable departure from the Title VII scheme was recognized by Congressperson Randall:

> "The Civil Service Commission utilizes the same administrative mechanism established under the Equal Employment Opportunity Commission to handle discrimination complaints based on race, color, religion and national origin.
>
> . . .

> However, under the civil service proceeding, this continuous informal conciliation and informal administrative proceeding, the individual can file a civil action in federal court prior to completing the administrative proceeding.
>
> In that particular situation, age discrimination differs from other EEO cases." Statement of Congressperson Randall, Hearings before Subcommittee on Equal Opportunities of the Committee on Education and Labor, 94th Cong., 2d Sess., on H.R. 14879 and H.R. 15342, at 5.

As stated in our brief in opposition (p. 6) to the Petition for Writ of Certiorari, the procedure and remedies are modeled after Sections 7(c) and (d):

> ". . . [F]ederal employees, like nonfederal employees, are entitled to file suit without going through an administrative remedy, with the difference being the federal employee need only wait thirty days to go to the courts after serving a notice of intent to sue on the EEOC, 29 U.S.C. §633a(d); whereas, a nonfederal employee must wait at least sixty days to go to court after serving a charge of age discrimination on the EEOC, 29 U.S.C. §626(d)."

B. By Express Grant of Jury Trial In Section 7(c)(2) of the ADEA, 29 U.S.C. §626(c)(2).

The right to a jury trial is expressly granted in 29 U.S.C. §626(c)(2). To conclude that such a grant is to be read in isolation contravenes established principles of statutory construction.

1. Inferring a Right to Jury Trial Or Applying the Provision of §626(c)(2) to Federal ADEA Suits Is Not Repugnant to the Purposes of the ADEA.

In 1961, the ADEA was first enacted Its purpose is to ". . . promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621.

In 1974, Congress amended the Fair Labor Standards Act by expanding the definitions of employee and employer to

include federal, state and other public employees. See 29 U.S.C. §203(d); 29 U.S.C. s203(e)(2). Fair Labor Standards Amendments ("FLSA") of 1974, Pub. L. 93-259, 93d Congress, 2d Sess., 88 Stat. 54, 58-29, 74-75. Thus, federal employees can now bring FLSA and Equal Pay Act suits for unpaid minimum wages and overtime compensation, as those terms are used in 29 U.S.C. §216(b)

By means of the same amendments, the ADEA was amended to include federal and other public employees. Nothing in the legislative history of the 1974 FLSA suggests that Congress meant to limit the liability of the federal government or that the rights, remedies or procedures of the FLSA would not apply to federal ADEA cases.

The act was again amended in 1978, with a primary purpose: ". . . to strengthen and broaden the provision of

the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age. This would be done by raising the current upper age limit of 65 in the ADEA to age 70. . . . This legislation does not affect the upper age limit of the act with respect to coverage of those Federal employees specified in Section 15(a) of the Act." S.R. No. 95-493, p. 1, as reported in Code and Congressional Administrative News, 95th Cong., 2d Sess. at 976.

It is significant that the purpose of the 1978 ADEA Amendments is to broaden, rather than to limit the scope of the act's applicability. None of the amendments abrogate the rights, remedies and procedures afforded by the act to "persons aggrieved," including those protected by Section 15 of the Act.

It is not inconsistent to construe the ADEA in pari materia with the FLSA, thus affording jury trial under Section 15 of the ADEA. Furthermore, the absence of any express denial in the ADEA of jury trial in suits brought under Section 15, and the legislative history and articulated purposes of the act and its amendments, warrant an inference that the jury provision of 29 U.S.C. §626(c)(2) controls.

2. Construing Section 15 in pari Materia with Other Sections of the Act Justifies a Conclusion of Right to Jury Trial Under Section 15 of the ADEA.

It is a basic tenet of statutory construction that

> "[P]rovisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction,

> both are to be so construed that effect is given to every provision in all of them." Sands, ibid., §51.02, at 290.

A fortiorari, such a tenet applies with even greater force to sections in pari materia with sections of the same act, particularly when, as in this instance, both sections of the act empower the court to make awards "for such legal and equitable relief as will effectuate the purposes of this Act." 29 U.S.C. §626(c)(1); 29 U.S.C. §633a(c).

Nothing in the legislative history of the ADEA or of the amendments suggests that this basic tenet of statutory construction should be abandoned.

3. Neither Section 15 Nor Any Other Section of the ADEA Restricts the Meaning of "Legal Relief" As Used in 29 U.S.C. §633a(c).

In 1978, a new subsection was added to Section 15 of the ADEA, Section 15(f), 29 U.S.C. §633a(f). The legislative

history surrounding this amendment is obscure (but cf. pp. 19-27, Brief for Members of Congress as Amici Curiae). However, the thrust of the purpose of the 1978 ADEA Amendments is not to restrict the rights or remedies or procedures of "persons aggrieved" filing suit under the provisions of Section 15 of the act, but rather, to eliminate the upper age limit entirely for federal employees, Section 12(b), 29 U.S.C. §631(b), and to expand the mandatory retirement age for most non-federal employees, except for certain classes of employees described in Sections 12(c) and 12(d), 29 U.S.C. §631(c) and (d).

There is no legislative history demonstrating an association between Section 15(f) and Section 7(c)(2). As noted by our amicus, AFGE: "[L]ike the amendments to Sections 15(a) and 12(a) lifting

the upper age limit for federal employees, Section 15(f) was given an effective date of September 30, 1978, six months beyond the date of enactment. The jury trial amendment, on the other hand, took effect on the date of enactment (April 26, 1978)." Brief for AFGE as Amicus Curiae, p. __.

Even if Section 15(f) is interpreted as a prohibition against construing the ADEA statute as a whole, nonetheless, the provisions of Section 15 still apply, thus preserving the right of the person aggrieved by the federal government to file suit in district court and to seek legal relief, 29 U.S.C. §633a(c).

Although Petitioner argues in his brief (P. Brief, 28-29), as he did in his Petition for Writ of Certiorari (Pet. 6-7), that Section 15(f) by its terms prohibits the application of any other provision of the ADEA, in particular, the provision

for jury trial in Section 626(c)(2), he did not raise this argument in the courts below, thus denying an opportunity to the district court and to the Court of Appeals to rule on the argument before this Court passes on its merits.

Further, Petitioner's interpretation of the provisions of Section 15(f) is contradictory to the position it took in Moysey v. Andrus, 481 F. Supp. 850 (D.D.C. 1979). In Moysey, the government argued that the federal employee seeking to certify a class action under the ADEA, had to meet the "opt-in" requirement of 29 U.S.C. §216, which the court found ". . . mutually exclusive with the Federal Rules regarding class actions. See, e.g., La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975)." 21 EPD, at ¶13,691.

The government's argument was that the provisions of Section 7(b) apply to actions brought under Section 15 of the Act, and therefore, by express reference, the provisions of 29 U.S.C. §§211(b), 216 (b), 217 and subsection (c) of Section 7 are applicable to Section 15 ADEA suits, a position directly antithetical to what Petitioner presents to this Court at this time.

There are other compelling reasons for concluding that the provisions of Section 15(f) are intended to protect federal employees from the employer defenses set out in Section 4(f)(2), from the exceptions to ADEA coverage in Section 11(f), and from the restrictions or qualifications in Sections 12(a), (c) and (d), rather than to deny them any rights, remedies or procedures nonfederal employees under the act enjoy.

What constitutes an illegal act of age discrimination or reprisal is not defined in Section 15, but rather, in Section 4, 29 U.S.C. §623. Similarly, no description of what kinds of legal or equitable relief the court can award in federal ADEA cases appears in 29 U.S.C. §633a(c). However, such enumeration does appear in Section 626(b).

Not surprisingly, the description of what form the relief ordered by the Court can take, which is found in 626(b) -- reinstatement, promotion, enforcing the amounts deemed to be unpaid minimum wages and overtime compensation -- is identical to the kinds of relief the EEOC can order for persons aggrieved in federal employment -- reinstatement or hiring of employees with or without backpay (the amounts owing and deemed unpaid minimum wages and overtime compensation in Section 626(b)).

To argue that Section 15(f) limits or denies rights, remedies or procedures to persons aggrieved in federal employment is, in effect, claiming special privilege for the federal government as an employer.

As the court stated in Harris v. U.S. Dept. of the Treasury, 489 F. Supp. 476 (N.D. Ill., 1980):

> "In order to find that Congress intended to deny this right in ADEA suits brought by governmental employees, this Court would require more convincing evidence of congressional intent to achieve this purpose than has been provided by defendants. In some cases, perhaps evidence that governmental interests would be frustrated by permitting jury trials might be persuasive. (Footnote omitted). In this case, however, the defendants have identified no governmental interest that would be affected adversely by allowing jury trials in public employee ADEA suits."

In addition, Attorney General Bell has ordered attorneys under his supervision not to take positions claiming a special status or role for the federal

government in employment discrimination claims:

> "In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. . . . [citations omitted]. Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases." (Emphasis added). Memorandum for United States Attorneys and Agency General Counsels from Attorney General Bell, Aug. 31, 1977, p. 2.

III. The Legislative History of the ADEA.

A. ADEA, 1967

In summarizing Section 7 of the ADEA, House Report 805 emphasizes that Section 7,

among other things, ". . . provides for the enforcement of the act in accordance with the powers, remedies and procedures of Sections 11(b), 16 (except (a) thereof), and 17 of the Fair Labor Standards Act of 1938, and Section 7 of this Act. . . . [L]iquidated damages will be payable only for willful violations." U.S. Congressional and Administrative News, 90th Cong., 1st Sess., 1967, at 2218.

From the onset, Congress was well aware that a jury trial was inevitable for ADEA cases, as this Court pointed out in Lorillard, since jury trials had been available for years in FLSA cases.

B. The Fair Labor Standards Amendments of 1974

In 1974, as already indicated, Congress simultaneously amended both the Fair Labor Standards Act itself and the ADEA to include federal employees under

the provisions of both acts, thus enabling federal employees to bring FLSA claims, Equal Pay Act claims, and ADEA claims to court.

Nothing in the legislative history of the FLS Amendments suggests that federal employees were to be treated any differently in terms of rights, remedies and procedures under the ADEA.

The application of the ADEA to federal employees was seen as a "logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the omission of federal employees from the ADEA as originally enacted "did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector" but reflected only the fact that most governmental employees were not then subject to the FLSA.

Id. This close linkage between the FLSA and the ADEA, which was acknowledged with explicit reference to federal government employees, provides further evidence that the use of FLSA procedures, including jury trial, was intended for ADEA actions against the government. [By permission of Terry Coleman, from Appellee's Brief below, p. 10].

C. The 1978 ADEA Amendments

There is no statement in the legislative history suggesting that the statutory right to jury trial would not be available to federal employees. The principal reason for amending the ADEA in 1978 was to extend the upper age limit of 65 to 70, to clarify an existing section of the act to prohibit mandatory retirement based on benefit plans or seniority systems, to extend protection against all forms of age

discrimination to the workers in the expanded age group (65-70), and to eliminate the upper age limit for federal employees. S.R. No. 95-493, 95th Cong., 2d Sess. 1 (1978). Nothing is mentioned about the right to jury trial.

On September 23, 1977, the House passed H.R. 5383, which was silent on the issue of jury trial. However, on October 19, 1977, Senator Edward Kennedy introduced an amendment to include an express grant of jury trial in the statute. 123 Cong. Rec. S.17297 (daily ed., Oct. 19, 1977). In the meantime, this Court decided Lorillard in February 1978, holding that parties are entitled to jury trial under the ADEA.

By the time the bill was reported by conference committee on March 14, 1978, the Lorillard decision had already been issued. Thus, the conference report

stated that the purpose of the codification of the right to jury trial also extended to any issue of fact regarding liquidated damages, since this Court had not decided that issue in Lorillard, supra, at 577, n. 2. Furthermore, the conference report stated:

> "The Senate amendment provides that in any civil action brought by a person alleging discrimination on account of age there shall be a right to a jury trial."
> . . .

There is no distinction between actions concerning nonfederal employment and those concerning federal employment. 125 Cong. Rec. H-2000 (daily ed., March 14, 1978).

The traditional view in statutory construction is that:

> "Although comments about an earlier act in a legislative committee report on a subsequent bill are not part of the legislative history of the earlier act and therefore have less probative force than legislative history, they are entitled to

> consideration as an expert opinion concerning its proper interpretation. Sands, ibid., at 266.

Thus, the statement Congressperson Pepper placed in the Congressional Record concerning congressional intent on the issue of jury trial in federal ADEA cases is of assistance to this Court in determining such intent:

> "Those who participated in the House and Senate debates [on the amendment] would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. . . . As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial." 125 Cong. Rec. E-4258 (daily ed., Sept. 9, 1979).

IV. Federal ADEA Suits Comprise A Small Percentage of Cases In Which the Government Is Involved, and There Is A Jury Demand.

The Petition for Writ of Certiorari states at p. 13 that "[j]ury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts."

In January and February 1981, three law students from Georgetown Law Center, Judy Shapiro, Christine McKinnon and Thomas Wassel,[11] examined the cover

11. This author wishes to acknowledge publicly the invaluable assistance of Ms. Shapiro, Ms. McKinnon and Mr. Wassel provided to her on a volunteer basis. Taking time out from their hectic first-year law school schedules, they completed the research asked of them in an accurate and timely fashion. In addition, they assisted the writer in reading cases and the legislative history, and in analyzing the data from the research on the cover sheets. Further thanks goes to Frances Sanchez who spent many hours typing this brief, and to Maria Holleran and Eileen O'Brien who gave last-minute assistance to the writer, without hesitation or remuneration, interrupting their own busy work and law school schedules to shepardize and copy cases which this writer needed to complete the writing of this brief. All of these individuals are a tribute to the legal profession they will be joining in a few years.

sheets, Form JS-44c, which accompany each complaint filed in district court throughout the country. They examined the cover sheets from January 1979 to January 1981, for a total of 25 months, filed in the U.S. District Court for the District of Columbia, where the greatest number of government cases are litigated.

The students found 189 jury demands in which the government is a party in the two-year period. Of these 189 jury demands, 18 are ADEA suits and 14 are suits in which the government made the jury demand. Thus, federal ADEA suits comprise 9.5% of government litigation involving a jury demand, only 2% greater than the number of jury demands made by the federal government itself.

V. Conclusion

Respondent seeks the following relief: That the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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